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In the Supreme Court of the United States

OCTOBER TERM 1940.

No. .....

COURT OF APPEALS NOS. 8421 AND 8422.

MARVIN L. GARDNER,
Trustee in Bankruptcy of Arthur George Doethlaff,
Bankrupt,
Petitioner,

vs.

ARTHUR GEORGE DOETHLAFF,
Bankrupt,
and
THE PENN MUTUAL LIFE INSURANCE COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

To the Honorable, the Supreme Court of the United States:

MARVIN L. GARDNER, Trustee in Bankruptcy of Arthur George Doethlaff, Bankrupt, respectfully petitioning, shows to the Court:

A.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

This case was presented in the lower tribunals on an agreed statement of facts, which facts, concisely stated, are as follows:

Arthur George Doethlaff, hereinafter referred to as the bankrupt, on the 11th day of January 1924, entered into a contract with The Penn Mutual Life Insurance Company, hereinafter called the Insurance Company, whereby the said Insurance Company issued a certain policy of life insurance upon the life of the said bankrupt.

In the policy when issued, the beneficiary named in the policy was Herbert A. Jones a partner in business of the insured. In the policy there was reserved to the insured the right to change the beneficiaries at any time.

On January 10, 1927, the beneficiary in the said policy was changed to Bertha E. Doethlaff, wife of the bankrupt. On June 25th, 1937, the policy was again changed to make Bertha E. Doethlaff the beneficiary, if she survived the bankrupt-insured; but making Arthur G. Doethlaff, Jr., the son of the bankrupt-insured, the beneficiary provided he survived the bankrupt-insured and Bertha, the first named beneficiary. (It is to be noted that this second change of beneficiaries was within four months of the adjudication of bankruptcy of the said bankrupt.)

On September 3, 1937, the bankrupt filed his voluntary petition and was adjudicated bankrupt on the same day.

The Bankrupt was insolvent during the entire four years immediately preceding his bankruptcy, and during the said four year period made payment to the Insurance Company, as premiums on this policy, $428.49; and was credited by the company during said period with dividend accumulations amounting to $328.88 and accrued interest on dividends amounting to $119.18, making a gross amount

on the books of the Insurance Company to the credit of the bankrupt at the time of his adjudication, of $876.55. The cash surrender value of the policy, as of the date of the adjudication, was $1,286.36.

By the express terms of the policy issued to the bankrupt-insured, the right to change the beneficiary was reserved to the insured; and in the rider to the policy wherein the last change of beneficiary was made, is this express provision:

> "Prior to maturity the right to make further changes of beneficiary or assignments, to surrender or borrow upon the policy, and to exercise all privileges of ownership shall be vested only in the Insured."

B.

PROCEDURE IN, AND FINDINGS OF, THE LOWER TRIBUNALS.

The Trustee in bankruptcy filed his petition before the Honorable Wm. B. Woods, referee in bankruptcy, against the bankrupt and the insurance company, setting forth that the insurance policy in question had a cash surrender value of $1299.48; and praying that the sum of $895.10, being the amount of premiums, dividends and interest in the hands of the insurance company to the credit of the bankrupt, be ordered paid over to him, the said Trustee. The referee found in *favor of the Trustee* in bankruptcy, and filed a written opinion. (Record, pp. 24, 25.) The referee's order is on pp. 23, 24 of the Record.

The case was brought before the District Court of the United States, upon a petition for review filed on behalf of the bankrupt. The insurance company filed no petition for review and made no effort to obtain a review of the ruling of the referee. The *District Court affirmed* the order of the referee, handing down a written opinion. (Record, p. 29.)

The bankrupt then endeavored to perfect an appeal to the Circuit Court of Appeals for the Sixth Circuit, being case numbered 8421 on the dockets of said court, said appeal being ineffective because it was neither begun nor perfected within the time limited by law.

The insurance company, notwithstanding the fact that it had taken no appeal from the order of the referee, endeavored to take its separate appeal from the order of the District Court to the Circuit Court of Appeals for the Sixth Circuit, being case numbered 8422 on the dockets of the said court.

Both of these appeals, and the Trustee's separate motions to dismiss them because of lack of jurisdiction, were heard at one session of the said appellate court. The said court handed down its written opinion, *overruling* both of the Trustee's said motions and *reversing* the order of both of the lower tribunals. A copy of the said opinion is attached to the record of the proceedings in the Circuit Court of Appeals for the Sixth Circuit.

C.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code (28 U. S. C. Section 347 (a), and 11 U. S. C. Section 47 (c)). The judgment of the Circuit Court of Appeals for the Sixth Circuit was entered January 17, 1941, and filed January 21st, 1941, and is reported in 117 Fed. 2nd 582. The petitioner's petition for rehearing in that court was filed February 19, 1941, and was denied March 5, 1941.

D.

QUESTIONS PRESENTED.

Upon the record and the opinion of the Circuit Court of Appeals for the Sixth Circuit, the following questions are presented for determination in the event that this petition for a writ of certiorari is granted.

1. Did the Circuit Court of Appeals for the Sixth Circuit have *jurisdiction* to hear and decide *either of the Appeals* attempted to be brought before it?

2. Did the Circuit Court of Appeals err in failing to search for and apply the *law of Ohio* to the facts in this case, under the mandate of *Erie Railroad vs. Tompkins,* and other cases?

3. Did the Circuit Court of Appeals err in holding that, where the terms of the policy reserved to the insured the right and power to *change the beneficiary* at will, that the beneficiaries had such a *vested interest* in the controversy as to require them to be made parties (when the settled law of Ohio is to the contrary)?

4. Did the Circuit Court of Appeals err in failing to find and to hold that the *power* of the bankrupt over the res in question passed to his Trustee under the *specific terms* of the Bankruptcy Act?

5. Did the Circuit Court of Appeals err in holding the fund in question could be *held as exempt* to the bankrupt, contrary to an *Ohio Statute* implemented by a recent decision of the *Supreme Court of Ohio,* exactly on the point?

Your petitioner contends that the said Court had *no jurisdiction* of these appeals whatever, and that said court's decision *was erroneous* in each of the other questions.

E.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

1. Because the Circuit Court of Appeals for the Sixth Circuit heard and adjudged two cases over which it *had no jurisdiction,* as shown by the face of the record.

2. Because the said court *failed to search for* and apply the *law of Ohio.*

3. Because the said court reversed the lower tribunals for *lack of necessary parties,* when, by the settled law of Ohio, said parties were *neither necessary* nor *even proper* parties.

4. Because the said court disregarded *specific provisions of the Bankruptcy Act* as to property and *powers* which pass to a Trustee in Bankruptcy.

5. Because the said court passed over and disregarded the *exemption laws of Ohio.*

6. Because the decision of said court *is not supported* by the *cases cited by itself.*

7. Because the decision of the said court is *contrary to law,* as declared by decisions of this Court, and by the courts of Ohio.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this Court for its review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings in the cases numbered and entitled on its docket "Nos. 8421 and 8422, Marvin L. Gardner, Trustee, etc. v. Arthur George Doethlaff, Bankrupt, and The Penn Mutual Life Insurance Company"; that the judgment of said United States Circuit Court of Appeals in said causes be reversed

by this Court, and that petitioner have such other and further relief in the premises as to this Court may seem just and proper.

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